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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re Appln. Of: SCHWARTZ et al.

Serial No.: 09/801,353

Filed: March 7, 2001

For: MASSAGING BED REST WITH LIGHT TECHNOLOGY CENTER #3700

Group: 3764

Examiner: YU, JUSTINE ROMANG

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BOX APPEALS

Board of Patent Appeals and Interferences
Assistant Commissioner of Patents & Trademarks
Washington, D.C. 20231

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TECHNOLOGY CENTER #3700

APPELLANTS' BRIEF ON APPEAL

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APPELLANTS' BRIEF ON APPEAL

This Brief is being filed in support of Appellant's Appeal from the Final Rejection by the Examiner mailed November 25, 2002. A Notice of Appeal was timely filed under Certificate of Mailing on January 14, 2003. A Petition for a One-Month Extension of Time accompanies this Appeal Brief.

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REAL PARTY IN INTEREST

The Real Party in Interest in this Appeal is Brookstone Company, Inc., 17 Riverside Street, Nashua, New Hampshire 03062. An Assignment from the inventors to Brookstone Company, Inc. was recorded by the United States Patent and Trademark Office on June 20, 2001 at Reel 012058, Frame 0219.

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RELATED APPEALS AND INTERFERENCES

To the best of the knowledge of the undersigned attorney and Appellants, no other appeals or interferences exist which would affect, or be directly affected by, or have a bearing on the instant Appeal.

STATUS OF THE CLAIMS ON APPEAL

Claims 1-14 and 16-51 are pending in the current Application. All the claims (claims 1-14 and 16-51) stand finally rejected and are on Appeal. The claims on Appeal are set forth in Appendix A attached hereto.

STATUS OF THE AMENDMENTS

Appellants filed Amendment B under Rule 116 amending claims 11, 35, 50 and 51 to overcome the Examiner's § 112 rejections. Amendment B was entered by the Examiner in the Advisory Action mailed February 26, 2003. Claims 11, 35, 50 and 51, as amended, are set forth in Appendix A. Claim 15 was canceled per Amendment A.

BACKGROUND OF THE INVENTION

The present invention relates to a back cushion, and more particularly, to a back cushion or bed rest including built in massage motors for providing the user with a massaging action to the back, an integrated reading lamp, and controls for the massaging action and the reading lamp.

Cushioned bed rests or bed loungers per se are known in the art¹. Bed loungers normally include a back portion and armrests or elbow rests. The back portion may be contoured and may

¹ While Appellants believe "bed rest" is an apt description for the product, in the earlier prosecution of the Application, the Examiner objected to the title as being misdescriptive. (See cipher 3 of the Office Action mailed August 19, 2002.)

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include a padded neck or headrest. Chair back massagers also are known in the art. One form of prior art back massager is in the form of a pad containing a mechanical massage arrangement powered by electricity. In use, a person places the massager against the back of a chair, automobile seat, or couch and then sits down and leans back against the massaging device. Other configurations have the massaging elements built into the seat back, for example in a lounge chair or automobile seat. Such massagers include a back portion including a massaging element driven by an electric motor.

THE INVENTION ON APPEAL

Before considering the specifics of the Invention on Appeal, it should be noted the present invention is a highly commercially successful invention that has been copied by several manufacturers. A Petition to Make Special based on Actual Infringement and additional examples of actual infringement are of record in the prosecution, and is evidence of additional third party infringers.

The present invention in broad aspect provides a cushion with a contoured back support surface, at least one built-in massage motor in the back support to provide massage action, and an integrated, over-the-shoulder reading lamp mounted to the back of the cushion. Independent claims 1, 27, 49, 50 and 51 all require this combination of elements.

Various other features are presented in dependent claims, including features such as massage motors carried in a moveable cushion which is detachably connected to the back portion by means, e.g., of a hook-and-loop type strip located on a tab extending from the moveable cushion and a retractable electric cord connection on the rear side of the moveable cushion plugs into the back portion of the cushion; independent touch sensitive button controls, e.g., for setting

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the speed of the motor, the levels of the vibration of the massaging elements and for power, and for turning the light off and on protected by a thin flexible membrane mounted on upper or side surfaces of an armrest; and a remote control panel connected to the cushion through a cord. The membrane switch features and remote control panel features also have been copied by the infringers.

ISSUES PRESENTED ON APPEAL

1. Whether claims 1-4, 10-12, 14, 16-20, 25, 27-32, 37, 39, 40, 45 and 47-50 are obvious over Jain (U.S. Patent No. 5,713,832) in view of Moceri (U.S. Patent No. 3,879,086);
2. Whether claims 5, 7, 34, 36 and 51 are obvious over Jain in view of Moceri as applied to claims 1 and 4 above, in further view of Kanda (U.S. Patent No. 5,316,369);
3. Whether claims 6 and 35 are obvious over Jain in view of Moceri and Kanda as applied to claim 5 above, in further view of Stottmann (U.S. Patent No. 5,453,586);
4. Whether claims 8 and 32 are obvious over Moceri as applied to claim 4 above, in further view of Stimpson (U.S. Patent No. 6,388,345);
5. Whether claims 9 and 33 are obvious over Jain in view of Moceri as applied to claim 4, in further view of Tomlinson (U.S. Patent No. 5,895,365);
6. Whether claim 13 are obvious over Jain in view of Moceri as applied to claim 10, in further view of Liang (U.S. Patent No. 5,429,585);
7. Whether claims 21-23 and 41-43 are obvious over Jain in view of Moceri as applied to claim 1, in further view of Gera (U.S. Patent No. 5,335,962);
8. Whether claims 24 and 44 are obvious Jain in view of Moceri as applied to claim 1 above, in further view of Foster, Jr. et al. (U.S. Patent No. 5,020,517); and

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9. Whether claims 22 and 46 under 35 USC §103 are obvious over Jain in view of Moceri as applied to claim 1 above, in further view of Guenther (U.S. Patent No. 5,613,222).

GROUPING OF CLAIMS

Claims 1-4, 10-12, 14, 16-20, 25, 27-32, 37, 39, 40, 45 and 47-50 are grouped together as containing the same essential patentable limitations. Thus, these claims stand or fall together.

Claims 4, 7, 34, 36 and 51 are grouped together as containing the same essential patentable limitations. Thus, these claims stand or fall together.

Claims 6 and 35 are grouped together as containing the same essential patentable limitations. Thus, these claims stand or fall together.

Claims 8 and 38 are grouped together as containing the same essential patentable limitations. Thus, these claims stand or fall together.

Claims 9 and 33 are grouped together as containing the same essential patentable limitations. Thus, these claims stand or fall together.

Claim 13 stands or falls alone.

Claims 21-23 and 41-43 are grouped together as containing the same essential patentable limitations. Thus, these claims stand or fall together.

Claims 24 and 44 are grouped together as containing the same essential patentable limitations. Thus, these claims stand or fall together.

Claims 26 and 46 are grouped together as containing the same essential patentable limitations. Thus, these claims stand or fall together.

As noted *supra*, the claims on Appeal are set forth in Appendix A attached hereto.

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THE REFERENCES

Jain, U.S. Patent No. 5,713,832 ("Jain")

This Patent, which is the primary reference, teaches an easy chair for supporting somebody in a resting or sitting position having a vibration device mounted therein. The vibrator may be attached to the inner springs of the article of furniture, or alternatively may be secured in some form of resilient cushioning such as foam. The vibrator may also include a heating pad.

Moceri, U.S. Patent No. 3,879,086 ("Moceri")

Moceri teaches a foldable sunshade attachment adapted to be removably mounted to a folding lawn chair. It mounts releasably but rigidly to an upper cross member of the back member of the chair, such as by a strap-type bracket mount secured to the cross member; and the mount adjustably carries an upright column including an elongated first tubular rod component of the attachment. A second rod component is adjustably secured to the first rod component and carries at its end a sunshade. The attachment allows for adjustments of the rod structure such as the elongation of the rod structure as a whole, the adjustment of the rod component its own axis, and the swinging of the rod structure in a vertical plane relative to the chair. Moceri also shows the arm component with Bowden wire construction so as to permit a person to bend the column and to move the sunshade to a position to suit the user. Finally, Moceri teaches an electrical lamp fixture that can be attached to the first tubular rod.

Kanda, U.S. Patent No. 5,316,369 ("Kanda")

Kanda teaches an arm rest comprising an arm rest body provided with a cavity for airplane seating. Within the cavity a television set is stored. A cocktail tray covers the cavity. The television set is provided with a hinge mechanism that is attached to the upper front end of

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the arm rest body so the television can be moved in and out of the cavity. Kanda also teaches a control panel for operating the television set provided with switches, a channel selector key, a volume controller and an earphone jack. The control panel is disposed on the side wall of the arm rest.

Stottmann, U.S. Patent No. 5,453,586 ("Stottmann")

Stottmann teaches a dishwasher control panel assembly including an escutcheon which supports various controls. A switch mechanism is mounted on the inside of the escutcheon and the push buttons extend through a slot in the escutcheon. A liner overlies the outside of the escutcheon and the push buttons extend through a corresponding slot in the liner. A thin, flexible cover overlies the liner and has an outwardly projecting touch pad aligned with each push button. In their extended positions the push buttons bias the touch pads outwardly and the cover is sufficiently flexible for the touch pads to move inwardly enough to depress the push buttons.

Stimpson, U.S. Patent No. 6,388,345 ("Stimpson")

Stimpson teaches a corner light switch assembly to be mounted to a wall corner at a predetermined location and vertical height. The corner light switch assembly includes a main switch body, an L-shaped switch body cover plate constructed of a transparent plastic material connected to the main switch body, a touch sensitive switch assembly mounted against the main switch body and engageable with the switch body cover plate, and a power supply cord to connect an appliance, table lamp or light fixture to the touch sensitive switch assembly for selective operation thereof.

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Tomlinson, U.S. Patent No. 5,895,365 ("Tomlinson")

Tomlinson teaches a massaging cushion for providing a vibrating back massage as well as other conveniences. The back portion has a contoured forward surface and a planar rear surface, and has recesses formed in the lower outer edges for pivotally attaching armrests. The back portion has a padded interior with a plurality of vibrating transducers disposed in said interior. The transducers have an electrical cord extending outwardly from the cushion for coupling with a standard electrical outlet. Finally, a control panel is disposed within the interior surface of one armrest and is in electrical communication with the vibrating transducers.

Gera, U.S. Patent No. 5,335,962 ("Gera")

Gera teaches a modular upholstered sectional sofa arrangement including a plurality of seating units and one or more table-like modular furniture units between adjacent seating units. The table-like units provide multiple surfaces for storing or displaying articles. Portions of the table are movable between open and closed positions to provide access or closure to a storage compartment under the lower table. This compartment may be used to store a telephone, books, videotapes and the like.

Foster, Jr. et al., U.S. Patent No. 5,020,517 ("Foster")

Foster teaches a back massager powered by a control unit attached to a back cushion via a cable. The control unit has a jack coupled to a control circuit and through the cable to the cushion. Either an AC adapter or a 12 DC battery adapter may be plugged into the jack. Finally, Foster teaches that an air bladder is disposed within the cushion. The air bladder may be pumped up or exhausted to control the firmness of the cushion.

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Guenther, U.S. Patent No. 5,613,222 ("Guenther")

Guenther teaches a headset for use with a cellular telephone in a car. The headset comprises an acoustical earpiece assembly adapted for the acoustical transmission of sound to the ear, a device for mounting the earpiece assembly on the head in a position adjacent an ear of a person wearing the headset, and a flexible acoustical receiving tube having an upper end connected to the earpiece assembly and a lower end attached to an acoustical receiving cup. The headset also includes a device for releasably attaching the acoustical receiving cup to a telephone in a position where the mouth of the cup is disposed closely adjacent the telephone speaker for receiving sound emitting from the speaker. The acoustical cup transmits sound to the earpiece assembly via the acoustical receiving tube. The earpiece assembly has a transmitter mechanism for picking up sounds made by a person wearing the headset, and for transmitting such sounds to the transmitter of the telephone.

ARGUMENTS ON APPEAL

1. **The Rejection of Claims 1-4, 10-12, 14, 16-20, 25, 27-32, 37, 39, 40, 45 and 47-50 as Obvious over Jain in View of Moceri is in Error.**

As the Examiner acknowledges, the primary reference, Jain, teaches an easy chair without a light source. But the Examiner takes the position that the missing teaching is provided by Moceri, stating:

A skilled artisan could have readily appreciated that Jain's chair could be included with a light source in view of Moceri's teaching.

(Final Rejection, pgs. 8-9)

This conclusion is clearly based upon impermissible hindsight. Jain does not teach or suggest a light source, and does not require a light source since Jain is a chair which is intended

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to be used in a living room or the like, which normally is lighted. Moceri adds a light specifically to counteract the darkening effect of his sunshade. Clearly, there is no motivation to combine the teachings. Moreover, Appellants include a light for an entirely different purpose than Moceri, namely to permit one person in a bed to read without disturbing his or her sleeping partner. Neither Jain nor Moceri is concerned with the problem addressed by Appellants, and there clearly is no teaching or suggestion in Jain that his chair would benefit by a built-in light source, i.e., taught by Moceri, to address an entirely different problem.

As pointed out by the Board of Patent Appeals and Interferences in an unpublished Decision in Appeal No. 1999-2401:

In rejecting claims under 35 U.S.C. § 103, the examiner bears the initial burden of presenting a prima facie case of obviousness. See In re Rijckaert, 9 F.3d 1531, 1532, 28 USPQ2d 1955, 1956 (Fed. Cir. 1993). A prima facie case of obviousness is established by presenting evidence that would have led one of ordinary skill in the art to combine the relevant teachings of the references to arrive at the claimed invention. See In re Fine, 837 F.2d 1071, 1074, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988) and In re Lintner, 458 F.2d 1013, 1016, 173 USPQ 560, 562 (CCPA 1972).

* * *

. . . Evidence of any suggestion, teaching, or motivation to modify a reference may flow from the prior art references themselves, the knowledge of one of ordinary skill in the art, or, in some cases, from the nature of the problem to be solved, see Pro-Mold & Tool Co. v. Great Lakes Plastics, Inc., 75 F.3d 1568, 1573, 37 USPQ2d 1626, 1630 (Fed. Cir. 1996), Para-Ordinance Mfg., Inc. v. SGS Importers Int'l., Inc., 73 F.3d 1085, 1088, 37 USPQ2d 1237, 1240 (Fed. Cir. 1995), cert. denied, 117 S. Ct. 80 (1996), although "the suggestion more often comes from the teachings of the pertinent references," In re Rouffet, 149 F.3d 1350, 1355, 47 USPQ2d 1453, 1456 (Fed. Cir. 1998). The range of sources available, however, does not diminish the requirement for actual evidence. That is, the showing must be clear and particular. See, e.g., C.R. Bard Inc. v. M3 Sys., Inc., 157 F.3d 1340, 1352, 48 USPQ2d 1225, 1232 (Fed. Cir. 1998), cert. denied, 119 S. Ct. 1804 (1999). A broad conclusory statement regarding the obviousness of modifying a reference, standing alone, is not

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"evidence." See In re Dembiczak, 175 F.3d 994, 999, 50 USPQ2d 1614, 1617 (Fed. Cir. 1999).

In our view, the only suggestion for modifying the applied prior art in the manner proposed by the examiner to meet the above-noted limitations stems from hindsight knowledge derived from the appellant's own disclosure. The use of such hindsight knowledge to support an obviousness rejection under 35 U.S.C. 103 is, of course, impermissible. See, for example, W.L. Gore and Assocs., Inc. v. Garlock, Inc., 721 F.2d 1540, 1553, 220 USPQ 303, 312-13 (Fed. Cir. 1983), cert. denied, 469 U.S. 851 (1984). It follows that we cannot sustain the examiner's rejections of [the] claims.
(*emphasis in original*)

Moreover, Moceri cannot be combined with Jain to render obvious the instant invention because Moceri relates to non-analogous art:

In order to rely on a reference as a basis for rejection of an applicant's invention, the reference must either be in the field of the applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the invention was concerned.

See In re Oetiker, 977 F.2d 1443, 1446 (Fed. Cir. 1992).

Here, Moceri teaches an attachment to an outdoor chair which is classified as a different art area within the U.S.P.T.O. While such evidence is not conclusive, in order to use a reference in a different art area, there must be some evidence that one with ordinary skill in the art would combine the Moceri reference with that of Jain to produce a vibrating bedrest cushion with a light (MPEP §2141.01A). The only thing that Jain and Moceri have in common is that they both are for sitting. The primary reference Jain concerns upholstered, cushioned indoor furniture having a built-in massaging device powered by a connection to electrical means. Moceri, on the other hand, concerns outdoor folding tubular light-weight furniture. Aside from the fact that Jain and Moceri are both for sitting, they essentially have nothing else in common. Who brings a lawn chair into the bedroom?

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Furthermore, Appellants' claimed invention combines a light and a massager integrated within a cushion. Lights and, in particular, light filaments are intrinsically fragile. Given the intrinsic fragility of light filaments, it is submitted one skilled in the art would not think to combine a light and a massager, since vibrations from the massage motor would be expected to dislodge or break the light filaments, thus rendering the light inoperative. Moceri does not have this problem, since Moceri's folding chair is not designed to vibrate. Moreover, Jain is designed for inside use, where lighting typically is well provided. Moceri is designed for outside use, where lighting is a problem only due to Moceri's provision of a sunshade. Thus, one skilled in the art would not think to combine Jain and Moceri to produce a bed rest cushion with a light and a massager.

Furthermore, Moceri's light is contemplated for outdoor use either because the light has been dimmed underneath the shade, or because it is of night-time use. Moceri does not contemplate the use of his light indoors where light is readily available. Thus, no one looking at Moceri would think to combine a light with a cushion for reading indoors. Thus, the rejection of independent claims 1 and 27, and the various claims dependent thereon, and the rejection of independent claims 49 and 50 as obvious from Jain in view of Moceri are in error.

2. The Rejection of Claims 5, 7, 34, 36 and 51 as Obvious from Jain in View of Moceri and Further in View of Kanda also Is in Error.

Turning to the rejection of claims 5, 7, 34, 36 and 51 as obvious over Jain in view of Moceri in further view of Kanda, all of these claims are directly or indirectly dependent on claims 1 or 27. The deficiencies of the primary combination of Jain and Moceri vis-à-vis claims 1 and 27 are discussed above. Furthermore, it is not seen that Kanda supplies the missing teachings to Jain and Moceri to achieve or render obvious claim 1 or claim 27. Kanda, which

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relates to aircraft seating, is another example of far afield non-analogous prior art the Examiner has assembled to make out a case of obviousness. First, you have Jain, who teaches a living room chair combined with Moceri, who teaches a folding lawn chair and Kanda, who teaches aircraft seating. Appellants' claims all are directed to a bed rest, not a living room chair, not a lawn chair, and not aircraft seating. Where is the motivation to combine living room chair art, folding outdoor seating art and aircraft seating art? Kanda has been cited as teaching an arm rest having a control panel with switches for controlling a reading light, and is acknowledged as so teaching. However, the more basic and essential combination, i.e., of combining a cushion or bed rest cushion including a massage motor and a light source mounted to the back of the cushion is not found in Kanda. Thus, no teaching of Jain, Moceri and Kanda reasonably could be said to achieve or render obvious claims 1 and 27, or claims 5, 7, 34 and 36 which depend thereon.

3. The Rejection of Claims 6 and 35 as Obvious from Jain in View of Moceri and Kanda and Further in View of Stottmann also Is in Error.

Turning to the rejection of claims 6 and 35 as obvious from Jain in view of Moceri and Kanda and further in view of Stottmann, claims 6 and 35 are dependent, respectively, on claims 5 and 34, which in turn are dependent, respectively, on claims 1 and 27. The deficiencies of the combination of Jain, Moceri and Kanda vis-à-vis claims 1 and 27 are discussed above. It is not seen that Stottmann supplies the missing teachings to Jain, Moceri and Kanda to achieve or render obvious claims 1 and 27 or claims 6 and 35 which depend indirectly thereon. Stottmann has been cited as teaching a flexible membrane for covering a control panel, and is acknowledged as so teaching. However, Stottmann also is from far afield non-analogous art. Stottmann is a dishwasher control panel. One might ask oneself how many bedrooms have

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dishwashers? Where is the motivation to combine such non-analogous art? Moreover, Appellants are not claiming a flexible membrane for covering a control panel per se. Missing from Stottmann and the several other references is a teaching of a cushion or bed rest cushion incorporating both a massage motor and a light source mounted to the back, as required by Appellants' independent claims, or any teaching that would lead one skilled in the art to combine the several references applied by the Examiner to achieve such a construction which, as noted above, would be contraindicated due to the known fragility of lamp filaments to vibration. Thus, claims 6 and 35 also cannot be said to be obvious from the applied art.

4. The Rejection of Claims 8 and 38 as Obvious from Jain in View of Moceri and Further in View of Stimpson Is in Error.

Turning to the rejection of claims 8 and 38 as obvious from Jain in view of Moceri and further in view of Stimpson, claims 8 and 38 also are also indirectly dependent on claims 1 and 27, respectively. The deficiencies of the combination of Jain and Moceri vis-à-vis claims 1 and 27 are discussed above. It is not seen that Stimpson supplies the missing teachings to Jain and Moceri to achieve or render obvious claims 1 and 27 or claims 8 and 38 which depend thereon. Stimpson has been cited as teaching a touch-sensitive switch that is known for adjusting the intensity of a light source. However, beyond that common touchstone, Stimpson is quite remote. Stimpson concerns a corner switch designed for mounting to a wall corner or door jamb, and as such also constitutes non-analogous art. Again, Appellants ask where is the motivation to combine such non-analogous art? Appellants' claimed invention concerns a cushion or bed rest cushion. Thus, Stimpson also is believed to constitute non-analogous art. Moreover, Stimpson, being a wall switch, clearly would not be used with a massaging motor. Thus, no combination of

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Jain, Moceri and Stimpson reasonably could be said to achieve or render obvious claims 1 and 27, or claims 8 and 38, which depend thereon.

5. The Rejection of Claims 9 and 33 as Obvious from Jain in View of Moceri and Further in View of Tomlinson Is in Error.

Turning to the rejection of claims 9 and 33 as obvious from Jain in view of Moceri and further in view of Tomlinson, claims 9 and 33 also depend, indirectly, from claims 1 and 27, respectively. The deficiencies of the combination of Jain and Moceri vis-à-vis claims 1 and 27 are discussed above. It is not seen that Tomlinson supplies the missing teachings to Jain and Moceri to achieve or render obvious claims 1 and 27 or claims 9 and 33, respectively, which depend therefrom. Tomlinson has been cited as teaching a cup holder located in an arm rest and is acknowledged as so teaching. However, Appellants do not claim to have invented the incorporation of a cup holder into an arm rest. Thus, claims 9 and 33 also are patentable over the art.

6. The Rejection of Claim 13 as Obvious from Jain in View of Moceri and Further in View of Liang Is in Error.

Turning to the rejection of claim 13 as obvious over Jain in view of Moceri and further in view of Liang, claim 13 is indirectly dependent on claim 1. The deficiencies of the primary combination of Jain and Moceri vis-à-vis claim 1 are discussed above. It is not seen that Liang supplies the missing teachings to Jain and Moceri to achieve or render obvious claim 1. Liang has been cited as teaching a massaging pillow detachably attached to chair, and is acknowledged as so teaching. By itself, Liang is not and cannot function as a cushion for supporting a person in a sitting position as required by Appellants' claims. Appellants do not claim to have invented

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per se a massaging pillow attached to a chair. Thus, the rejection of claim 13 as obvious from the art is in error.

7. The Rejection of Claims 21-23 and 41-43 as Obvious from Jain in View of Moceri and Further in View of Gera Is in Error.

Likewise, the rejection of claims 21-23 and 41-43 as obvious from Jain in view of Moceri and further in view of Gera is in error. Of all the various art combinations proffered by the Examiner, Jain and Gera are the only references that are even remotely related, i.e., Jain is a living room chair, and Gera is living room seating. However, neither of these references relates to bed rests. Aside from this common touchstone, the combination of Jain, Moceri and Gera still does not begin to teach or suggest Appellants' claims. In this latter rejection, the Examiner acknowledges Jain's cushion lacks a telephone, but cites Gera as a chair having a telephone. However, Appellants do not claim to have invented per se the vision of a chair with a telephone. Thus, the rejection of claims 21-23 which depend directly or indirectly on claim 1, and the rejection of claims 41-43 which depend directly or indirectly on claim 27 likewise are in error.

8. The Rejection of Claims 22 and 24 as Obvious from Jain in View of Moceri and Further in View of Foster Is in Error.

Turning to the rejection of claims 22 and 24 as obvious from Jain in view of Moceri and further in view of Foster, claims 24 and 44 are dependent on claims 1 and 27, respectively. The deficiencies of Jain and Moceri vis-à-vis claims 1 and 27 are discussed above. Foster does not cure the deficiencies. In the rejection, the Examiner refers to Foster as teaching a massaging cushion including a bladder. Even assuming *arguendo* the Examiner's characterization of Foster is correct, Foster still fails to supply the more basic and essential missing teachings to Jain and

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Moceri to achieve or render obvious claims 1 and 27 and claims 24 and 44 which depend, respectively, therefrom.

9. The Rejection of Claims 26 and 46 as Obvious from Jain in View of Moceri and Further in View of Guenther Is in Error.

Finally, turning to the rejection of claims 26 and 46 as obvious from Jain in view of Moceri and further in view of Guenther, claims 26 and 46 are dependent, respectively, on claims 1 and 27. This combination is yet another example of the Examiner's reliance on non-analogous art. Guenther concerns a headset for automotive use! Now the Examiner brings a car into the bedroom to make out a case of obviousness! The deficiencies of the primary references Jain and Moceri vis-à-vis claims 1 and 27 are discussed above. It is not seen that Guenther supplies the missing teachings to the primary combination to achieve or render obvious claims 1 and 27 or claims 26 and 46 which depend thereon. Appellants' claims 26 and 46 require the transmitter coupled to the arm of a bed rest cushion. Guenther does not teach this. Guenther's transmitter 23 is coupled to the user. Thus, in addition to failing to supply the missing teachings to Jain and Moceri to achieve or render obvious claims 1 and 27, Guenther also fails to supply the specific teachings specified by dependent claims 26 and 46.

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Application Serial No. 09/801,353
Docket No. Brookstone 00.04
APPELLANTS' BRIEF ON APPEAL

CONCLUSION

As is clear from the foregoing, all of the art rejections are based on hindsight.

In view of the foregoing, it is respectfully submitted that the Examiner's Final Rejection of the subject Application is in error, and it is requested that the Rejection be reversed in all respects.

Respectfully submitted,



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CERTIFICATE OF MAILING

I hereby certify that this correspondence is being deposited with the United States Postal Service as First Class Mail in an envelope addressed to: BOX APPEALS, Board of Patent Appeals and Interferences, Assistant Commissioner of Patents, Washington, D.C. 20231 on April 14, 2003, at Tucson, Arizona.

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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

In re Appln. Of: SCHWARTZ et al.
Serial No.: 09/801,353
Filed: March 7, 2001
For: MASSAGING BED REST WITH LIGHT
Group: 3764
Examiner: YU, JUSTINE ROMANG DOCKET: BROOKSTONE 00.04

BOX APPEALS
Board of Patent Appeals and Interferences
Assistant Commissioner of Patents & Trademarks
Washington, D.C. 20231

APPENDIX A

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APPENDIX A

CLAIMS ON APPEAL

1. A cushion for supporting a person in a sitting position, comprising:
a back portion comprising a contoured forward surface and a generally planar rear surface, the surfaces separated by a padded interior;
at least one massage motor carried by the back portion; and
a light source for providing light for a user, the light source mounted to the back portion by an arm.
2. The cushion of claim 1, wherein the arm is flexible.
3. The cushion of claim 2, further comprising a handle coupled to the flexible arm to allow a user to adjust the position of the light source.
4. The cushion of claim 1, further comprising an armrest coupled to the back portion.
5. The cushion of claim 1, further comprising a control panel for altering the on/off status of the light source.
6. The cushion of claim 5, wherein the control panel comprises at least one switch for altering the on/off status of the light source, the switch being covered by a flexible membrane.
7. The cushion of claim 5, wherein the light source is coupled to the control panel by an electrical communication, the electrical communication enclosed within the interior of the cushion.

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8. The cushion of claim 4, wherein the armrest comprises an actuator for adjusting the intensity of the light source.

9. The cushion of claim 4, wherein the armrest comprises a cup holder.

10. The cushion of claim 1, further comprising a plurality of massage motors carried by the back portion.

11. The cushion of claim 10, further comprising a controller for altering the on/off status of the massage motors.

12. The cushion of claim 10, wherein the massage motors are enclosed between the forward surface and the rear surface.

13. The cushion of claim 10, wherein the massage motors are carried in a pillow which is removably detachable to the back portion.

14. The cushion of claim 10, wherein the massage motors comprise pulsating transducers.

16. The cushion of claim 10, wherein the massage motors comprise vibrating massage motors.

17. The cushion of claim 10, wherein the massage motors comprise percussive or roller massage motors.

18. The cushion of claim 1, further comprising a removable lamp support housing for coupling the arm to the back portion.

19. The cushion of claim 1, further comprising a battery for supplying power to the light source.

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20. The cushion of claim 4, wherein the back portion is angularly adjustable relative to the armrest.

21. The cushion of claim 1, further comprising a telephone base station enclosed within the cushion.

22. The cushion of claim 1, further comprising a speaker for generating sound waves, the speaker enclosed within the cushion.

23. The cushion of claim 22, wherein the speaker is electrically coupled to a telephone base station enclosed within the cushion.

24. The cushion of claim 1, wherein the padded interior comprises an inflatable bladder.

25. The cushion of claim 1, further comprising a heat source enclosed within the cushion.

26. The cushion of claim 1, further comprising a transmitter for generating output signals, the transmitter coupled to the arm.

27. A massaging bed rest cushion for supporting a person in a sitting position, comprising:

a back portion comprising a contoured forward surface and a rear surface, the surfaces separated by a padded interior,

a plurality of massage motors enclosed between the forward surface and the rear surface, and

a light source mounted to the back portion for providing light for a user.

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28. The massaging bed rest cushion of claim 27, wherein the massage motors comprise vibratory massage motors.
29. The massaging bed rest cushion of claim 27, wherein the massage motors comprise percussive or roller massage motors.
30. The massaging bed rest cushion of claim 27, wherein the massage motors comprise pulsating transducers.
31. The massaging bed rest cushion of claim 27, wherein the light source is mounted to the back portion by a flexible arm.
32. The massaging bed rest cushion of claim 27, further comprising an armrest coupled to the back portion.
33. The massaging bed rest cushion of claim 27, wherein the armrest comprises a cup holder.
34. The massaging bed rest cushion of claim 27, further comprising a control panel for altering the on/off status of the light source.
35. The massaging bed rest cushion of claim 34, wherein the control panel comprises at least one switch for altering the on/off status of the light, the switch being covered by a flexible membrane.
36. The massaging bed rest cushion of claim 34, wherein the light source is coupled to the control panel by an electrical connector, the electrical connector enclosed within the interior of the bed cushion.
37. The massaging bed rest cushion of claim 27, further comprising a control panel for altering the on/off status of the massage motors.

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38. The massaging bed rest cushion of claim 27, further comprising an actuator for adjusting the intensity of the light source.

39. The massaging bed rest cushion of claim 27, further comprising a removable lamp support for mounting the arm to the back portion.

49. A massaging bed rest cushion for supporting a person in a sitting position, comprising:

a back portion comprising a contoured forward surface and a rear surface, the surfaces separated by a padded interior;

a plurality of massage motors enclosed between the forward surface and the rear surface;

a light source mounted to the back portion for providing light for a user; and
a heater enclosed within the cushion.

50. A massaging bed rest cushion for supporting a person in a sitting position, comprising:

a back portion comprising a contoured forward surface and a rear surface, the surfaces separated by a padded interior;

a plurality of massage motors enclosed between the forward surface and the rear surface;

a light source mounted to the back portion for providing light for a user;
a heater enclosed within the cushion; and
a controller for altering the on/off status of the massage motors.

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51. A massaging bed rest cushion for supporting a person in a sitting position, comprising:
- a back portion comprising a contoured forward surface and a rear surface, the surfaces separated by a padded interior;
- a plurality of massage motors enclosed between the forward surface and the rear surface;
- a light source mounted to the back portion for providing light for a user;
- a controller for altering the on/off status of the massage motors; and
- an on/off device on the controller for altering on/off status of the light source

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